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The Commonwealth of Massachusetts
Executive Office of Public Safety
Fire Safety Commission

Automatic Sprinkler Appeals Board

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CHAIRMAN

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VICE CHAIR

Docket # 2006-130

**138 Brighton Ave
Boston, MA**

AUTOMATIC SPRINKLER APPEALS BOARD DECISION

A) Statutory and Regulatory Framework

This is an administrative appeal held in accordance with Massachusetts General Laws Chapter 30A; Chapter 148, section 26G½ and Chapter 6, section 201, relative to a determination of the Boston Fire Department, requiring the installation of an adequate system of automatic sprinklers in a building owned and/or operated by Big City Management Corporation, d/b/a Big City (hereinafter referred to as the Appellant). The building, which is the subject of the order, is located at 138 Brighton Ave, Boston, MA.

B) Procedural History

By written notice received by the Appellant on April 6, 2006, the City of Boston Fire Department issued an Order of Notice to the Appellant informing it of the provisions of M.G.L c. 148, s.26G½, which requires the installation of an adequate system of automatic sprinklers in certain existing buildings or structures. The building subject to the order is located at 138 Brighton Ave, Boston, MA. The Appellant filed an appeal of said order on May 3, 2006. The Board held a hearing relative to this appeal on April 10, 2008, at the Department of Fire Services, Stow, Massachusetts.

Appearing on behalf of the Appellant were: Joseph P. Hanley, Esq. and Marc Kadish, President, Big City Management d/b/a Big City. Appearing on behalf of the Boston Fire Department were Captain David Cushing, Fire Prevention; and Rich Baldowski, Engineer.

Present for the Board were: Maurice Pilette, Chairman; Alexander McLeod; John Mahan; Aime DeNault; and George Duhamel. Peter A. Senopoulos, Esquire, was the Attorney for the Board.

C) Issue(s) to be Decided

Whether the Board should affirm, reverse or modify the enforcement action of the Boston Fire

Department relative to the subject building in accordance with the provisions of M.G.L. c.148, s. 26G½?

D) Evidence Received

1. Application for Appeal by Appellant
2. Description of Facility and Statement in Support of Appeal
3. Order of Notice of the Boston Fire Department
4. Letter from Boston Fire Dept. to Appellant's Representative
5. Menu, Pictures of Facility
6. Notice of Pre-Hearing Status Conference to Appellant
7. Notice of Pre-Hearing Status Conference to Boston Fire Dept.
8. Notice of Hearing to the Parties
9. 2nd Notice of Hearing to the Appellant
10. 2nd Notice of Hearing to the Boston Fire Department
11. 3rd Notice of Hearing to the Appellant
12. 3rd Notice of Hearing to the Boston Fire Department
13. 4th Notice of Hearing to the Appellant
14. 4th Notice of Hearing to the Boston Fire Department
15. Copies of two Memoranda from the ASAB that accompany Hearing Notices
16. Appellant's Submissions (A-F)
17. Plans of Facility (submitted by the Boston Fire Dept.)
18. Description of Building
19. Appellant's Photos (A & B)
20. Website Advertisements (A-C)
21. Beer list (provided by Boston Fire Dept.)
22. Additional website advertisement
23. Photos provided by Boston Fire Dept. (A-PP)

E) Subsidiary Findings of Fact

- 1) The Boston Fire Department issued an Order of Notice to the Appellant on April 6, 2006, requiring the installation of an adequate system of automatic sprinklers in a building located at 138 Brighton Ave, Boston, MA in accordance with the provisions of M.G.L. c. 148, s.26G½. The Appellant filed an appeal of said order on May 3, 2006. After attending a pre-hearing status conference and following requested continuances, the Board held a hearing relative to this appeal on April 10, 2008, at the Department of Fire Services, Stow, Massachusetts.
- 2) The subject building is a two-story structure located in the Allston section of Brighton (Boston) which contains two business establishments. One of the establishments, the Sunset Grill, was the subject matter of a previous hearing conducted by this board. The second establishment within said building and the subject matter of this appeal, operates under the name of "Big City", a for profit corporation. The establishment provides public accommodations on two floors and has a legal capacity of 388 persons throughout the facility. There is currently no separate occupant capacity or physical/operational separation within the facility, which establishes a delineation between any "bar" area and "dining area".

- 3) Photographs of the exterior of the establishment feature multiple neon beer signs in the second floor windows. Additionally, there is signage on the front exterior of the building that states: “80 Taps, Big Pool Hall... Plasma TV’s & Foosball”. The front entrance displays the words “Pool Hall” on the glass portion of the door.
- 4) The facility has been issued a license to expose, keep for sale and to sell “Wines and Malt Beverages with Liqueurs” to be consumed on the premises. The license indicates that “all patrons out by 1:30 a.m.” It is noted that there are no restrictions on the license, as in some other establishments, that limit the purchase of alcoholic beverages to only those persons who are eating a meal.
- 5) Large screen and regular televisions are positioned throughout the establishment. The business possesses an entertainment license, which allows for five widescreen televisions, a jukebox and five smaller televisions. Appellant testified that the establishment does not currently feature live musical entertainment and is not legally allowed to do so.
- 6) The Appellant contends that the establishment is “principally” used as a restaurant and is therefore specifically exempt from the sprinkler provisions of M.G.L. c.148, s.26G½. There was testimony and evidence, in the form of menus, newspaper and advertisement commentary, that indicate that the establishment features a wide assortment of food items and serves lunch, full course meals and Sunday brunch. The facility is open daily until 1:00 a.m. Appellant indicated that food is available until closing time and that the kitchen is open during all hours of operation. The Appellant suggested that the board should also consider the establishment’s limited liquor license as a factor to support the conclusion that the facility is not a “bar”, as that term is used in the statute.
- 7) The Appellant did admit that the establishment, in addition to being known for its wide assortment of food at reasonable prices, is also noted for one of the largest beer selections in the City of Boston. It advertises the availability of 80 different types of beer. The establishment also sells margaritas, flavored vodka drinks, cordials and a variety of other liqueurs. Appellant argues that the “bar-like” and entertainment characteristics of the facility are merely incidental to the establishment’s principal use as a restaurant. The “bar area” is used for the service of meals, but a customer can also patronize this bar area and other areas of the establishment solely for the purchase of alcoholic beverages at any time during the hours of operation. The Appellant also testified that the pool tables can be covered and converted into dining tables when necessary for special pre-planned events. At such events a portable “beer tap” is placed at the table for the purposes of self-service by table guest. Pitchers of beer are also routinely available.
- 8) The representatives of the Boston Fire Department testified that the determination and Order to install sprinklers was based upon the overall capacity limit, the extensive bar area, wide beer selection, liqueur sales, and the existence of entertainment activities in the form of pool and foosball. The Fire Department contests the Appellant’s characterization that the establishment is “principally” a restaurant and contends that the Big City and Sunset Grill are operationally one establishment within the same building connected by a common passageway on the first floor. The Appellant indicated that on a routine basis, staff and food items (and on occasion, patrons) pass through the common entryway. The representatives of the Fire Department agreed that the establishment serves a significant amount of food. However, they indicate the establishment has

more characteristics as a bar. They indicated that the establishment's web site advertises the establishment as a "Pool Hall, Pizza Kitchen and Beer Bar" and boasts "21 championship pool tables, 80 big beers" in addition to the "outrageous pizzas and Big Menu". Additionally the Fire Department submitted documentation that the facility hosts Fooseball tournaments that pay out cash prizes. The tournament referenced charged a \$20.00 entry fee for contestants. A web site editorial profile states "The popular Allston hangout takes patrons back to the days when drinking beer and playing pool were part of everyone's life." Another page advertised a Super Bowl XLII event which featured "80 beers on tap, 14 pool tables, 9 big screen TV's and \$.25 wings". Likewise, photographs of exterior signage displayed on the front of the building prominently advertises "80 Taps... Big Pool Hall... Plasma TV's & Fooseball." The fire department noted that there is a lack of separation to distinguish any "bar" area from a "restaurant" area.

- 9) Testimony and photographs of the second floor indicate an open area that consists of a variety of seating arrangements, including high tables with high chairs, low tables with chairs, and wooden tables with booths and chairs. The photographs also show a wide-open space with multiple pool tables and fooseball tables positioned throughout the area. There is a significant bar stocked with a substantial variety of alcoholic beverages and scores of beer taps. There are numerous signs, neon lights, ornaments, artwork, and a variety of other paraphernalia displayed throughout the interior of the establishment, which promote the consumption of specialty beers and liqueurs. Some of the photographs depict patrons at tables, the bar, standup tables and pool tables obviously engaged in social drinking activities. Some of the tables feature significant quantities of alcoholic beverages, including pitchers of beer, but no food items.
- 10) Upon questioning the Appellant indicated that the establishment occasionally, particularly during busy evenings or events, have staff check identification at the door to assure that the minimum age for serving alcohol is observed and to keep a head count to prevent overcrowding and conduct security activities. The Appellant indicated that this particular area of Allston, is frequented by college students who are attracted to the many bars in the area.

F) Ultimate Findings of Fact and Conclusions of Law

- 1) The provisions of the 2nd paragraph of M.G.L. c. 148, s. 26G½, in pertinent part, states: "every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a night club, dance hall, discotheque, bar, or similar entertainment purposes... (a) which is existing or (b) for which an approved building permit was issued before December 1, 2004, shall be protected throughout with an adequate system of automatic sprinklers in accordance with the state building code". The law was effective as of November 15, 2004.
- 2) The statutory timeline for said sprinkler installation in accordance with the provisions of section 11, St. 2004, c.304, requires the submission of plans and specifications for the installation of sprinklers within 18 months of the effective date of the act (by May 15, 2006) and complete installation within 3 years of the effective date of the act (by November 15, 2007).
- 3) Upon review of the record, including documents and the described activities that occur within this building, it is clear that this establishment is public assembly occupancy with a total capacity of

388 persons. Therefore, the subject building is considered a public assembly with a capacity of 100 persons or more.

- 4) This establishment currently does not feature live entertainment, a dance floor or dancing. Additionally, neither party offered any documentation indicating whether this building is classified as an “A-2” or an “A-3” use group. Under the provision of the State Building Code, 780 CMR (6th Edition), the “A-2” classification includes those establishments that are “designed for occupancy as dance halls, nightclubs and for similar purposes” (see 780 CMR 303.3). Under said 780 CMR, restaurants are generally classified within the “A-3” use group (see 780 CMR 303.4). The particular use group classification is an important factor in determining whether this establishment is subject to the sprinkler requirements of M.G.L. c. 148, s. 26G½. However, this classification alone is not the sole factor that this Board will look at in making a determination. In a memorandum dated 1-10-05, this Board issued an interpretive guidance document relative to the provisions of this new law, c.148, s. 26G½. This new law was a portion of a comprehensive legislative initiative undertaken as the result of a tragic Rhode Island nightclub fire, which took place in February 2003. In said memorandum, this Board noted that the statute did not contain a definition of the words “nightclub, dance hall, discotheque, bar or similar entertainment purposes”. This Board reviewed the legislative intent and background of the statute and concluded that there were certain characteristics typical of nightclubs, dancehalls and discotheques. The board indicated that such occupancies are characterized, but not limited to, the following factors:

- a) No theatrical stage accessories other than raised platform;
- b) Low lighting levels;
- c) Entertainment by a live band or recorded music generating above-normal sound levels;
- d) Later-than-average operating hours;
- e) Tables and seating arranged or positioned so as to create ill defined aisles;
- f) A specific area designated for dancing;
- g) Service facilities primarily for alcoholic beverages with limited food service; and
- h) High occupant load density.

It was the interpretation of this board that such characteristics are typical of the “A-2 like” occupancy (which was a general reference to the A-2 use group referenced in 780 CMR, the State Building Code) and that these are some of the types of factors that heads of fire departments should consider in enforcing the sprinkler mandates of M.G.L. c.148, s. 26G½. However, it was indicated that the list of characteristics was not necessarily all-inclusive and that the factors may be applied individually or in combination, depending upon the unique characteristics of the building at the discretion of the head of the fire department. It is important to note that some of the particular characteristics, such as entertainment by a live band, recorded music generating above normal sound levels and a specific area designated for dancing, may not necessarily exist in

certain establishments that are considered a “bar”. Nevertheless, the provisions of M.G.L. clearly apply to “every building or structure, or portions thereof, of public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a...**bar**...”.

- 5) In its 1-10-05 memorandum the Board acknowledged the existence of establishments that may feature characteristics of both a restaurant and a bar or nightclub. In determining whether or not such “combination” establishments are subject to the provisions of M.G.L. c.26G½, this Board indicated that it will look at such common sense factors such as:
- a) Does the restaurant establishment regularly and routinely serve meals on a daily basis?
 - b) Does the establishment provide a bar, bar seating, bar standing and a bartender for the purposes of serving alcoholic beverages directly to alcohol consuming customers?
 - c) Does the bar and bar seating area have the ability to expand into the dining area to accommodate special entertainment activities or increased capacity/density?
 - d) If the establishment provides a bar and bar seating, are alcoholic beverages continuously served to customers more than one hour after full kitchen facilities have been closed?
 - e) Is live or recorded music provided for dancing purposes or for a viewing audience? (does not include background dinner music)?
 - f) Does the establishment provide special entertainment, including but not limited to: musical, theatrical, comedy, or sport viewing activities?
 - g) Based upon the establishment’s name, décor, atmosphere, does a customer expect a bar or nightclub type establishment?
 - h) Is the establishment or portions thereof routinely or regularly used for private or public functions for dancing, parties, celebrations, entertainment or performance purposes?
 - i) Does the establishment have an entertainment license?

These factors are not necessarily all inclusive. However, such factors or combination of factors may be considered to determine if the occupancy has existing activities or conditions that are similar to nightclub, dance hall, discotheque, bar, or similar entertainment purposes.

- 6) Based upon the evidence provided at the hearing, this establishment currently serves significant meals on a daily basis. However, in looking at the characteristics as a whole, it also features substantial characteristics typical of a “bar” or “similar entertainment purpose.”
- a) The establishment features later than average operating hours. The facility has been issued a license to expose, keep for sale and to sell “Wines and Malt Beverages with Liqueurs” to be consumed on the premises. Under the terms of said license, patrons are allowed to stay in the premises until 1:30 a.m. and alcoholic beverages are served until 1:00 a.m. This late hour is well beyond the usual hours of operation of an establishment that is typically

operated “principally” as a restaurant. Additionally, this facility features substantial bar service, bar seating and a bartender during all hours of operation for the purposes of serving alcoholic beverages directly to alcohol consuming customers. Alcoholic beverages are legally available to customers at all times of operation, whether they choose to eat a meal or not.

- b) Based upon multiple characteristics relating to décor, atmosphere and its presentation to the general public, a customer can reasonably expect significant “bar” or pub-like accommodations and activities. The Board finds substantial evidence that this establishment is clearly marketed as something more than a restaurant. The exterior, interior and internet advertisements clearly are designed to target customers who seek to experience “bar- like” and related entertainment activities. The front exterior of the building consists of large glass windows with numerous neon signs advertising a wide selection of beers. The interior of the establishment features a décor and atmosphere typical of a bar or pub. The open area consists of a variety of seating arrangements, including a well stocked bar with bar stools, high tables with high stools in addition to several wooden tables and booths with chairs and benches. There are numerous signs, ornaments, artwork, and beer and wine paraphernalia displayed within the establishment that promote various types of beers and liqueurs. Photographs of the exterior depict signage displayed on the front of the building, which prominently advertises “80 Taps... Big Pool Hall... Plasma TV’s & Fooseball.”
 - c) The establishment’s unique features and marketing efforts as a “Pool Hall” and a forum for Pool and Fooseball tournaments, with cash prizes, in addition to the facility’s extensive array of big screen televisions sets for hosting “Super Bowl” events, are also significant factors in this Board’s determination. The statutes use of the words “...or similar entertainment activities” to modify the words: ...”night club, dance hall, discotheque, and bar”... clearly indicate that it was the legislature’s intent to include the existence of such entertainment activities as a factor in applying the new law. A statement found on a web page and made part of the record, is consistent with the board’s conclusions herein: “The popular Allston hangout takes patrons back to the days when drinking beer and playing pool were part of everyone’s life”.
 - d) The establishment’s policy, during busy hours of operation, to position staff at the entryway to provide additional security, monitor head count and to check identification to determine customer age, is an additional factor in this Board’s consideration. Such practices, although common in nightclubs or “bar like” establishments, are rarely employed in restaurant facilities that emphasize the meal and the dining experience as the principal customer attraction.
- 7) Based upon the foregoing findings and reasonings, as well as consideration of the record as a whole, the Appellant’s position that this establishment is “principally a restaurant” and therefore exempt under the provisions of M.G.L. c. 148 s. 26G½ is without merit. Although the facility currently provides a significant assortment of food offerings, this establishment is also significantly, clearly and legally “a public assembly with a capacity of 100 persons or more, that is designed or used for occupancy as a...bar, or similar entertainment purposes...” and therefore within the legislative intent and scope of the sprinkler provisions of section 26G½.

G) Decision and Order

For the foregoing reasons, this Board unanimously upholds the Order of the Boston Fire Department to install sprinkler protection in the subject building in accordance with the provisions of M.G.L. c.148, s.26G½. Sprinkler installation shall be completed by November 15, 2008. Plans for such installation shall be submitted to the Boston Fire Department within ninety (90) days of the date of this decision.

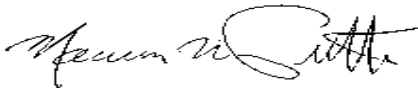
H) Vote of the Board

Maurice Pilette, Chairman	In Favor
Alexander MacLeod	In Favor
John J. Mahan	In Favor
Aime DeNault	In Favor
George Duhamel	In Favor

I) Right of Appeal

You are hereby advised that you have the right, pursuant to section 14 of chapter 30A of the General Laws, to appeal this decision, in whole or in part, within thirty (30) days from the date of receipt of this order.

SO ORDERED,



Maurice Pilette, P.E. Chairman

Dated: June 3, 2008

A COPY OF THIS DECISION AND ORDER WAS FORWARDED BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED TO:

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